

No. 1564

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH DECKER,

Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY
(a corporation),

Appellee.

APPELLEE'S BRIEF.

GEO. W. TOWLE,

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Pacific Coast Steamship Company.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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STATEMENT OF THE CASE.

This is a suit, as stated in the complaint (tr. p. 3), "to Abate a Private Nuisance". For cause of action plaintiff alleges that she, and one John Johnston who has refused to join with plaintiff in her suit, are the owners, as tenants in common, of certain upland, Block L, situate at Juneau, Alaska, and alleged to now border upon the navigable waters of Gastineaux Channel. That the defendant corporation has maintained and now maintains, in front of said lands, a wharf and certain buildings which prevent

the plaintiff from wharfing out or maintaining a wharf in front of said premises which wharf is a private, direct, irreparable and material damage to plaintiff and whereby plaintiff and her co-owner have been damaged in the sum of \$1000 during the two years last past. And plaintiff's prayer is: that the decree of this Court be that said wharf be abated, and that she and her co-owner recover damages in the sum of \$1000—her co-owner not claiming that the wharf should be abated nor that he has been so damaged.

For answer Pacific Coast Steamship Company alleges:

That it is in possession of the premises not as owner, but only as tenant of The Pacific Coast Company. That it did not construct any of the structures complained of, but that the same were all constructed by its lessor, The Pacific Coast Company, and the predecessor in interest of that company long prior to the lease of the same by defendant; and this under an express authority, or license so to do, given or granted by plaintiff and by her certain deed, duly executed, acknowledged and recorded, of date February 20, 1897, whereby "all littoral and appurtenant rights by them (plaintiff and her husband) owned, or any littoral or appurtenant rights *that might thereafter exist, in and to the shore of Gas-tineaux Channel between the ordinary line of high tide and deep water in the town of Juneau, Alaska*"—that is, all such rights in front of Block

L—were conveyed to People's Wharf Company; and that all rights so granted or given have, by mesne conveyances of record, been vested in The Pacific Coast Company, a New Jersey corporation, which purchased the complained of structures that had been constructed by its predecessor in interest without any notice whatever of any adverse claim by plaintiff, and has since, with her knowledge, and without protest upon her part, expended large sums in the construction and maintenance of the structures complained of. That Pacific Coast Steamship Company is only a lessee of the premises from The Pacific Coast Company, *and is therefore not the real party in interest.* That there is a defect of parties *in that The Pacific Coast Company, the owner of the property, is not made a party to the suit.* And defendant's prayer is, that the suit be dismissed at the plaintiff's costs.

In her reply to that answer plaintiff denies that the littoral rights referred to were ever so conveyed, or were so purchased by The Pacific Coast Company; and denies that there is a defect of parties. Alleges that when the deed referred to was executed, to wit, on Feby. 20, 1897, the title to the littoral rights referred to was in the United States, and were not then a subject of private ownership. That she is a woman and has at all times relied upon the advice of hired counsel, and that not until within the year last past has her counsel ever informed her that she had any such rights as she now asserts.

The case was tried before the Court, and a judgment of dismissal entered. The Court's opinion is set forth at pages 18-23 of the record.

At page 21 the Court said: There are in this case three questions, any one of which is decisive.

FIRST: Is or is not the Pacific Coast Steamship Company the real party in interest? And the Court's answer (page 21) is that Pacific Coast Steamship Company *is not* the real party in interest.

As to the second question, the effect of appellant's deed, the Court (page 23) held that it conveyed all littoral rights appurtenant to Block L of the lands of plaintiff; and *third*, that her long acquiescence in the use of the premises, by The Pacific Coast Company and its predecessor in interest, *had estopped her from now claiming that the wharf*,—which with her full knowledge and at large expense had been constructed and maintained for commercial use—*is a nuisance*.

FINDINGS OF FACT.

The Court found (page 32) that defendant, Pacific Coast Steamship Company is the lessee of The Pacific Coast Company; and that defendant has not erected any structure upon said premises and does not claim ownership of any such structure.

That plaintiff (pages 30-33) did by due and proper deed of conveyance quitclaim and convey to People's Wharf Company all her littoral and riparian rights

here in controversy, and that by mesne conveyances all rights so conveyed were vested in The Pacific Coast Company when this suit was commenced which company then was, and since had been, in possession of the same by its lessee Pacific Coast Steamship Company.

That (page 32) plaintiff has with knowledge thereof, and without protest, allowed improvements of great value to be placed upon said premises by those claiming a right so to do under her deed.

BRIEF ON BEHALF OF DEFENDANT.

THERE IS A DEFECT OF PARTIES, IN THAT THE PACIFIC COAST COMPANY WAS NOT MADE A PARTY DEFENDANT.

I.

The Pacific Coast Company is the sole owner of the structures complained of. If plaintiff's prayer were granted, the wharf and other structures by the Court declared to be a private nuisance and ordered abated, it is The Pacific Coast Company's property that would be so ordered to be destroyed. But the rule is imperative that no Court can make such an order until after the party to be so affected has been duly brought into, and has had his day in, the Court that is requested to so do.

Ribon v. The Chicago &c. Ry. Co. et al., 16 Wall. 446;

U. S. v. Central Pacific R. Co., 11 Fed. 449, 458;

Shields v. Barrow, 17 How. 130; 15 L. Ed. 158.

II.

Plaintiff is, by her deed, estopped from claiming any littoral rights in connection with her property—Blocks K and L in the town of Juneau. See deed, Decker and wife (the present plaintiff) of date Feby. 20, 1897 (pages 55-6) whereby plaintiff and her husband expressly granted to People's Wharf Company a right to erect and maintain a wharf in front of said Blocks K and L. Also deed by People's Wharf Company (pages 63-6) to Waterbury and Coolidge; and (pages 69-77) deed of Waterbury and Coolidge to The Pacific Coast Company, by which last mentioned deeds there was conveyed to The Pacific Coast Company all rights granted to People's Wharf Company by plaintiff's deed of February 20, 1897.

Plaintiff's idea (page 54) seems to be that: "The
 " rights of the riparian owner cannot be detached
 " from the soil out of which they arise or to which
 " they are incident, and therefore cannot be trans-
 " ferred without an actual conveyance of the soil
 " itself."

That is to say: that a right to construct a wharf in front of land having littoral rights may not be assigned or transferred, or a license so to do be given, save only by a conveyance of the title to property to which such wharfage right is attached.

Were that the fact, there could be no such thing as a valid easement of use in the property of another: No legal right to use lands for any purpose

unless the title to the land be transferred, in order that a use of it may be had.

It may be conceded that the owner of land bordering upon navigable waters has, by virtue of such ownership, a right of access to such water, and a right to maintain a wharf or pier extending therefrom out to the point (*Illinois Cent. R. Co. v. People*, 145 U. S. 387; 36 L. Ed. 1018) where such waters become navigable. But that right, like his right to mine in his land; his right to pass over a particular part of it; his right to use all or any part of it; may be parted with, may be granted, and he still retain legal title to all of his land. Surely a right of public or private way over land may be granted without granting a fee in the land subjected to such use: and a wharf, maintained from the shore out into navigable waters, is no more than a way. In this Case the owner of Blocks K and L, if those blocks fronted on tide water, had originally a right to maintain a way out to navigable water from the whole shore boundary of those blocks. By their deed, referred to, they parted with such right—granted it to their grantee—and The Pacific Coast Company now has that right to the full extent that plaintiff and her husband originally possessed or since may have acquired the same.

But, assuming that the position of plaintiff were correct; that is, that she could not convey such right; how then can she be heard to claim that what she expressly authorized to be constructed and main-

tained is, as to her, a private nuisance? that what she authorized to be done—what has been constructed at large expense in reliance upon her consent—shall be destroyed and at her sole behest? Her contention appears so monstrous that we are not at all surprised at the statement in her complaint, that not until within the year has she found hired counsel who would advise her that she has such rights as she here asserts.

That littoral rights may be conveyed, see *Farnham on Waters*, Vol. III, Section 724 (a), and authorities there cited.

24 American and E. Encyc. of Law, (2nd Ed.), p. 982.

Even under the English rules, the grant by the riparian owner was good as against himself—and that is all that is needed in this case, for here the only one complaining is the one who expressly granted a perpetual right to erect and maintain the wharf structure.

III.

Much stress is laid by appellant on the fact that the appellant's deed of her littoral rights was in the nature of a "quitclaim"; and therefore it is claimed that her deed would not affect an after acquired title. But her deed conveyed (quitclaimed) *not only the present rights of the grantors, but also* (tr. pp. 55-6) "*all right, title, interest and estate, legal*

“ or equitable * * * to the shore of Gastineaux
 “ Channel, *which we may now or may hereafter pos-*
 “ *sess by virtue of any law of the United States or*
 “ *otherwise, by reason of our now being the owners*
 “ *of Blocks K and L in the town of Juneau * * **
 “ *And we further hereby grant (not quitclaim) to*
 “ *the party of the second part the right to wharf out*
 “ *from our said premises southwesterly to deep*
 “ *water and maintain wharves and warehouses*
 “ *thereon for the benefit of commerce and to own,*
 “ *possess and occupy the same forever by itself and*
 “ *its successors and assigns * * * .”*

We submit, the Court was entirely right when it found that all of appellant’s littoral rights passed out of her by that deed.

IV.

Appellant contends that it was not proven that “People’s Wharf Company”—the grantee in her deed—was a corporation. That question we do not deem material. Some one, using that name, negotiated with appellant and her husband regarding their littoral rights, and the result was that such rights were deeded to whomsoever was then using that name. It is immaterial whether it was John Smith alone who was so doing, or a number or persons who, in compliance with all of the formalities of law, had organized a *de jure* corporation. It is sufficient here that appellant did business with

whomsoever was using that name, and executed to him, them, or it, as the case may be, the deed referred to. Appellant having so done, she can not now defeat her deed by showing, if such were the fact, that there was in fact no such corporation; no more so than, if she had in fact negotiated with some one named John Jones, he falsely assuming for the occasion the name John Smith, she could defeat her deed by showing that there was no such person as John Smith. But here there is no proof whatever that People's Wharf Company *was not* a corporation—what appellant claims is only that there is no competent proof that *it was* a corporation. That it was a corporation may be inferred from (page 55) appellant's deed; (page 63) from the deed of People's Wharf Company, and again (pages 59-60) from a copy of the Articles of Incorporation. And whether or not the persons who so assumed to be a corporation had a right so to do can only be questioned by the state.

Appellant's deed conveyed her rights to some one, either a corporation or some one using a corporate name, and it is that person or that corporation only, not appellant, who may now question the right of The Pacific Coast Company to the ownership and possession of what was conveyed by that deed. Appellant having parted with her interest, granted to some one and his or its successors and assigns a perpetual right to construct and maintain the wharf; she is now a stranger to any question as to who it is that

may be entitled to possess that which she, by her deed, divested herself of.

At page 45 of the transcript it appears that the entry of the townsite of Juneau, pursuant to the Act of March 3, 1891, (26 St. 1095) was made on Oct. 13, 1893; and that the trustee deed, under that entry, was made to appellant and her husband on Oct. 13, 1893. Whatever littoral rights are now attached to those lands were therefore so attached on the last mentioned date, and were therefore all conveyed by the deed to People's Wharf Company (tr. p. 55) of date February 20, 1897; for there is nothing here to show any after acquired title to such rights by either appellant or her husband. If, as appellant claims, Blocks K and L, when her deed was executed, were bounded by a street—not by the waters of Gastineaux Channel—then her present rights would be only such as attached when those blocks were so bounded. For it surely cannot be a fact that a later removal of the surface of the intervening lands, be it a street or otherwise, would divest the littoral rights of the owner of those lands, or would give to the owner of lands so made to temporarily border on tide water any littoral rights whatever. Appellant's contention, that Blocks K and L were in 1897 bounded by a street, is therefore *felo de se*; for, at page 10 of her brief, her counsel says: "I will not burden this record with authorities in support that where a street intervenes between the upland and tide water no littoral rights attach to the upland."

Appellant contends that Blocks K and L were bounded by a street, not by Gastineaux Channel, in 1897 when she executed her deed; but there is no evidence that such street has ever been abandoned, nor that appellant has acquired title thereto. What appellant in this connection relies upon (pages 10-11 of her brief) is the allegation of her complaint (p. 3), not denied, "That said premises (when the " suit was commenced) abut on the waters of Gas-
 " tineaux Channel *at mean high tide* and against
 " which premises the tide regularly (at mean high
 " tide) ebbs and flows twice in twenty-four hours". But the fact that *at high tide* the lands did then so abut is not evidence for or against the existence of a street between those lands and tide water—certainly not evidence that appellant had acquired littoral rights simply because tide waters were then, *at high tide*, permitted to so flow over such street.

Appellant's contentions, regarding a street and her littoral rights, come to this: If her lands were originally bounded by a street, not by tide water, she had and has no littoral rights: If her lands did originally bound on tide water, then she has parted with such rights: If, by reason of her ownership of said lands and as an incident thereto she has, for any reason, since acquired littoral rights, then those rights were conveyed by her deed which expressly conveyed (tr. p. 55) all such littoral rights as should thereafter attach to such lands, be they legal or equitable. So that in any view that may be taken of the situation of Blocks K and L, as abut-

ting on a street or on tide water, she has no present right to contest the right of any one to maintain a wharf in front of those lands. Much less, in view of her grant (tr. p. 56) of a perpetual right to maintain such a wharf, has she a right to here contend that such wharf, maintained for general commercial uses and therefore presumably extended far beyond the inshore limits of navigable water, shall be abated as a private nuisance.

In conclusion we respectfully submit that the fact that The Pacific Coast Company, the owner of the wharf, was not made a party to this suit is, in and of itself, a sufficient reason for the judgment of dismissal that was entered; and further, that appellant, by her deed, and by her long acquiescence, is estopped from claiming that the wharf structure is a private nuisance—that in any view that may be taken of her contentions, regarding the situation of Blocks K and L with reference to tide water, she appears to be without present interest in any littoral rights that ever were or now are connected with such lands.

Respectfully submitted,
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Pacific Coast Steamship Company.

